LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 3 1972
E. ROBERT SEAVER, CLERK

No. 71-901

In the Supreme Court of the United States

OCTOBER TERM, 1971

PHILIP GROOB, PETITIONER

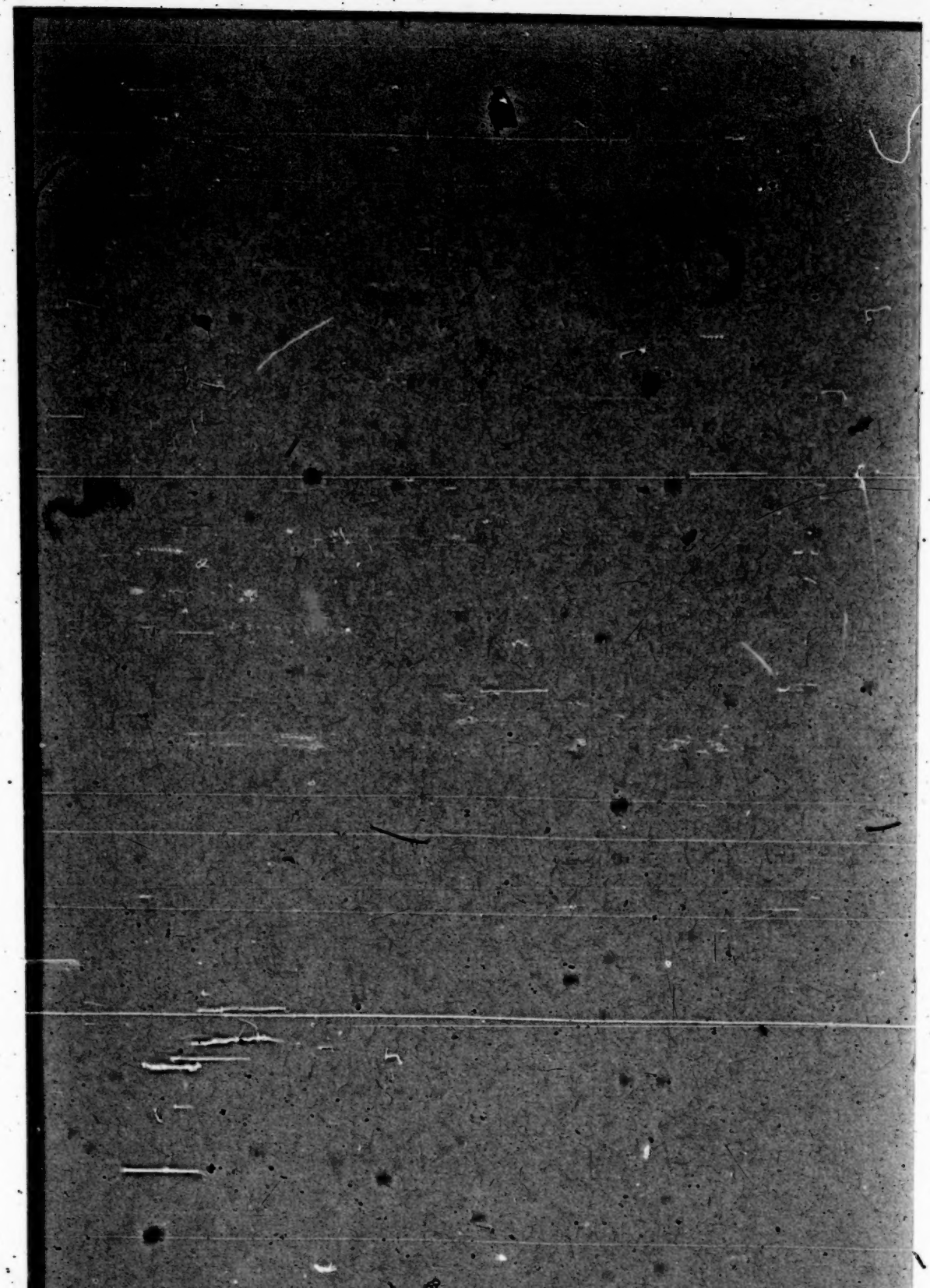
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-901

PHILIP GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Memorandum for the United States in Opposition

After a jury trial in the United States District Court for the Southern District of New York, petitioner, an accountant, was convicted of paying a $700 bribe (Count Two) and conspiracy to pay this bribe (Count One) to an agent of the Internal Revenue Service (Bernard M. Singer).[1] On April 16, 1971, petitioner was sentenced to imprisonment for one year and fined $5,000 on Count One. Six months of this sentence and the sentence imposed on Count Two were suspended. The court of appeals affirmed (Pet. App. A. 21-22).

[1] Codefendant Adalbert Gross, the taxpayer represented by petitioner, pleaded guilty to one of the three counts in the indictment.

459-450-72

In early 1968, Internal Revenue Agent Bernard Singer began an audit of the 1966 personal income tax return of Adalbert Gross, a diamond merchant, and his wife (A. 3).[1] Agent Singer found, and raised questions about, two $15,000 bank deposits reflected in the Gross bank account for 1966. Petitioner told the agent that this money was a gift from Mrs. Gross' father, Mor Fisch. According to petitioner, this money had been buried twenty-five years earlier in a cache in a synagogue in Hungary when Mr. Fisch had fled from the Nazis (A. 4–8). Allegedly Mr. Fisch had returned to Hungary in 1965, found the money and deposited it in a Swiss bank in the name of Mrs. Gross. The agent interviewed Mr. Fisch and asked petitioner to document the story with affidavits, passports, and with bank records. Thereafter, in June 1969, after receiving the final affidavit, the agent referred the case to the Intelligence Division for consideration for fraud prosecution. Recommendation for prosecution was declined (A. 13, Exhibit 1).

In December 1969, Singer advised petitioner of his conclusion to treat the $30,000 as income to the Grosses and told petitioner that he was willing to explain this conclusion to the taxpayer. When petitioner asked if the matter could be compromised, Singer replied that, in light of the single issue of fact involved, he could not make any compromise. Petitioner then told him to think about it and to contact him at his home phone number before business hours if the agent thought anything else (A. 13–15). At this point,

[1] "A" refers to the joint appendix filed in the court below.

Singer informed first his supervisor and then the Inspection Service of the Internal Revenue that petitioner had suggested calling his home phone number (A. 13–16). They discussed the possibility that petitioner might initiate a bribe and Singer was instructed to conduct the audit as he had previously and was told not to solicit a bribe (A. 185–186). On December 24, 1969, Singer telephoned petitioner at his home phone number, discussed the facts of the case with him, declined a renewed request from petitioner to compromise, and arranged to meet petitioner and the taxpayer at petitioner's office. (A. 17–19; Exhibit 4A). This conversation and subsequent telephone calls with petitioner were recorded; subsequent meetings were monitored by a broadcasting device concealed on the agent's person.

On January 27, 1970, Singer met petitioner and Gross. He explained why he was skeptical of the taxpayer's story and, while he reiterated that the matter could not be compromised because of the single factual issue involved, he agreed to discuss the case with his supervisor (A. 24–30; Exhibit 5A, pp. 1–27). At the conclusion of the meeting, petitioner showed Singer to an elevator, asked him if there was anything that he wanted to say that he had not stated before and asked him: "Do you know what you want." (A. 30–31; Exhibit 5A, p. 28). Petitioner then asked Singer to join him for a cup of coffee and walked with him to a nearby jewelry store owned by petitioner's cousin. In a back room, petitioner asked Singer the procedure for making the entire $30,000 nontaxable.

Petitioner then said that he had a certain percentage in mind, like 20 percent. The agent responded "How about 25" and petitioner said "Well, what about my share. I want $500." They then settled on $2,000 for the agent and $500 for petitioner (A. 31–33; Exhibit 5A, p. 30–34). The next day petitioner confirmed that they had a deal (A. 35; Exhibit 6A).

The agent and petitioner met again on January 29, 1970. Petitioner suggested solving the problem of the $30,000 by destroying a previously executed waiver of the statute of limitations. When the agent said that he could not do that without getting himself in trouble, petitioner replied that he never previously had had any problem in similar situations. (A. 38, 40). In the meeting petitioner offered to give Singer seven or eight hundred dollars on the receipt of a copy of the agent's report (Exhibit 7A, p. 3–4), indicating no change in the taxpayer's return. On February 4, 1970, Singer gave petitioner and Gross a copy of the report accepting the Mor Fisch story and showing no tax liability. After reading the report, petitioner and Gross suggested that it would be better if the agent "delete entirely the $30,000 issue and forget about it." After Singer agreed to rewrite the report, petitioner gave him an envelope containing $700. (T. 42–50; Exhibit 8A).

In his own defense, petitioner relied on the defense of entrapment. He testified that following the meeting of January 27, 1970, Singer initiated the bribe by saying "If you pay me the legal fees that you are willing to pay an attorney, I could close the case" (A.

375). He claimed that he agreed to deal with the agent only after a hysterical Gross implored him to deal with the agent (A. 376–378). Petitioner testified that he was "shocked" by the agent's overture, but admitted that he must have gotten over being shocked a few moments later when he asked for $500 out of the deal. (A. 412).

In its instructions upon entrapment, the court charged in part as follows (A. 541–542):

> Thus, in considering the defense of entrapment, you must first consider all the evidence and determine whether or not there is credible evidence that Groob was lured or induced by Agent Singer to have $700 paid to Singer, as was done here, or to conspire with Gross to do so.
>
> If you conclude there is no credible evidence that Groob was so lured or induced by Singer, then you need go no farther with the defense of entrapment; for, if there was no such inducement or luring here, Groob was not entrapped. On the other hand, if after considering all the evidence you conclude that there is credible evidence that Groob was lured or induced by Singer to participate in the payment of the $700, you must then go on to consider a second question. That is, whether or not the government has established beyond a reasonable doubt that Groob, prior to such inducement, was ready and willing to commit the offenses charged and was merely awaiting an opportunity to do so. Or, to put it another way, that he had a predisposition to commit these offenses—that is, he was already willing and ready to

> pay or to participate in the payment of the $700 to Singer. And you cannot convict unless you find that the government has established this beyond a reasonable doubt.

I. Petitioner argues that the quoted charge improperly placed upon him "the burden of proving his innocence" (Pet. 11). Petitioner's characterization of the charge is simply inaccurate. The entrapment charge as it was given in this case and as it is usually given in the Second Circuit placed no such burden upon the defendant.

In *United States* v. *Brawer*, 450 F. 2d 799 (C.A. 2), petition for certiorari pending (No. 71-944), dealing with entrapment instructions—unlike those in this case—explicitly placing upon the defendant the burden of proving inducement "by a fair preponderance of the evidence," the court noted that it would be preferable that courts "not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parts" (450 F. 2d at 805). The court in *Brawer* stated: "In explaining the burden on proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime" (*Ibid.*). Quoting this language from *Brawer* the court of appeals in this case held that the instructions correctly complied with that standard (Pet. App. 22).

Unable to find any language in the charge imposing any explicit burden on the defendant, petitioner seizes

on the court's use of the term "credible evidence" of inducement, which he contrasts with the term "some evidence" suggested in *Bravet, supra*. However, as the court of appeals observed "credible evidence" is virtually identical to "some evidence" (Pet. App. 22).

The entrapment charge as used in the Second Circuit requiring the jury to find "some evidence" or "credible evidence" of inducement by the government before the entrapment defense is raised, is not in conflict with other circuits. Thus, in *Kadis* v. *United States*, 373 F. 2d 370, 373–374, the First Circuit rejecting the so-called bifurcated entrapment defense, stated:

> * * * Henceforth we will look, singly, at the ultimate question of entrapment. *If the defendant shows*, through government witnesses or otherwise, *some indication that a government agent corrupted him*, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness. * * * [Emphasis added.]

Similarly, the Fourth Circuit in *United States* v. *DeVore*, 423 F. 2d 1069, 1071 required "some indication" of inducement by the government:

> In *Kadis* the First Circuit correctly formulated the rule: *if the defendant*, through government witnesses or otherwise, *shows some indication that he was corrupted by government agents*, the burden of disproving entrapment will be on the prosecution. * * * [Emphasis added.]